TAN SWEE THIAM v. UNITED OVERSEAS BANK (MALAYSIA) BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
[CIVIL APPEALS NO: B-02(A)-584-03-2017, B-02(IM)-1736-08-2017 & B-02(IM)-1737-08-2017]
18 JUNE 2019

LAND LAW: *Charge – Order for sale – Cause to contrary – Bank obtained order for sale of property charged as security for loan – Whether chargor settled outstanding loan – Whether redemption notice evidence of settlement of outstanding loan – Chargor adjudged bankrupt – Whether sanction of Director General of Insolvency obtained – Whether there were compelling reasons to justify refusal of order for sale – National Land Code, s. 256*

The appellant obtained a housing loan and a fixed loan, both totalled RM243,000 from the respondent and as security, the appellant granted a charge of his property ('the property') in favour of the respondent. Subsequently, the appellant was adjudged a bankrupt and the housing loan went into default. Consequently, the respondent obtained an order for sale pursuant to s. 256 of the National Land Code ('NLC'), the subject matter of the first appeal herein. The two other appeals were against the dismissal of the appellant's application to set aside the order for sale and application for an extension of time to file an affidavit-in-reply. However, the sanction of the Director General of Insolvency ('DGI') for the conduct of the appeals, as the appellant was an undischarged bankrupt, was only granted in respect of the first appeal. Hence, the second and third appeals were withdrawn and consequently struck out. The central issue in the present appeal was whether the trial judge had erred in law and on the facts in granting the order for sale pursuant to s. 256 of the NLC. The appellant contended that around the time he was adjudged a bankrupt in September 2013, he had approached and met with a manager of the respondent's branch to discuss the settlement of his outstanding loans on the property and sought to redeem the property. The appellant was informed of the total outstanding sum and, relying on the manager's statements and representations, the appellant's wife fully paid off the outstanding sums towards the housing loan and the fixed loan, in the sum of RM177,680.05 ('the redemption sum'). The appellant informed the respondent that the property had been redeemed and that his solicitors would be attending to the discharge of the charge and enclosed a notice of redemption, containing the appellant's latest address. There was no response from the respondent. Four years later, the appellant learnt that the property would be sold at a public auction pursuant to a court order for sale. The appellant found out that the respondent had been sending all the

correspondences and letters to his old office address, and claimed that he had never received any of them. The appellant contended that he had shown cause to the contrary as to why the order of sale should not have been granted in the first place, *ie*, by adducing evidence to show that the outstanding loans had been settled. Further, the payment of the outstanding sums was confirmed by the respondent wherein the respondent had written to the DGI for consent to keep the monies paid, treat the related loans settled and the property redeemed. It was only upon the DGI's reply to the effect that any sale *via* private treaties would not be permitted and that the respondent's request to retain the monies paid was rejected, that the respondent returned the monies paid to the DGI. The request of the DGI for the redemption sum to be forwarded to its department was attended to by the respondent and thereafter, the respondent commenced the *ad rem* proceedings under s. 256 of the NLC. It was the contention of the appellant that, at all material time, the respondent was fully aware that the redemption sum belonged to the appellant's wife and, despite such knowledge, had forwarded the redemption sum to the DGI. At the hearing of the appeal, the respondent sought to introduce four pieces of new evidence as fresh and further evidence, *via* encl. 15a.

Held (allowing appeal with no order as to costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) There was merit in the respondent's application to introduce the four pieces of new evidence as the evidence were of relevance and of assistance in this appeal and in fact arose after the decision appealed against. Hence, the respondent's application in encl. 15a was allowed. (para 27)

(2) The action to set aside a charge upon one or more grounds of defeasibility under s. 340 of the NLC is an action *in rem*. The payment of the redemption sum at the material time had been confirmed by the respondent's own affidavits and letters sent to the DGI. The letter to the DGI revealed, not only the respondent's acceptance of payment and settlement of the redemption sum, but also showed complacency on the part of the respondent, in that, there was a prolonged lapse of time between the acceptance of payment before the respondent started its line of inquiry with the office of the DGI and before the respondent finally forwarded the payment of the redemption sum to the DGI. The letter further revealed the respondent's decision and intention to lift the charge on the property, that it was merely seeking the DGI's sanction for its actions and decisions because the appellant had been adjudged a bankrupt. (paras 30, 32 & 34)

(3) The insolvent state of the appellant was upon the respondent's own petition and the respondent was not a private individual but an institution whose business was to lend money and hold, as securities or collateral for such loans, landed properties such as the property. The

respondent was also advised by legal counsel at all times. Therefore, it was surprising that the respondent could refer to the various actions as not being in the least prejudicial to the rights and interests of the appellant as the outstanding loans had still not been settled. (para 36)

(4) The respondent had relied on the last known address as indicated in the loan documents to serve the relevant documents on the appellant. The evidence, however, plainly showed that the respondent was in receipt of the notice of redemption, wherein, the appellant's latest address was clearly imprinted. Therefore, the respondent must be taken to have been aware of the address or at least, put on notice in that regard. Having relied on the notice of redemption and having accepted payment, for which the respondent was thus seeking the agreement of the DGI to keep and treat the loan as redeemed and the charge lifted, good conscience and the rules of equity militated against the granting of the respondent's application for an order for sale of the property. These were strong and compelling reasons to justify the withholding of the relief sought under s. 256 of the NLC. (paras 37 & 38)

(5) Evidence showed that the redemption sum had been fully paid up, the respondent had every intention of lifting the charge and kept the redemption sum for a substantial period before approaching the DGI to sanction its actions. After failing to procure the DGI's sanction, the respondent never advised the appellant or the appellant's wife about the state of affairs; it even failed to respond to the appellant's letters. As the respondent was still intent in redeeming the charge, there were strong compelling reasons to warrant and justify the refusal of the respondent's application. (paras 41 & 45)

Bahasa Malaysia *Headnotes*

Perayu memperoleh pinjaman perumahan dan pinjaman tetap, kedua-duanya berjumlah RM243,000 daripada responden dan sebagai jaminan, perayu memberi gadaian hartanahnya ('hartanah') berpihak pada responden. Kemudian, perayu dihukum seorang bankrap dan pinjaman perumahan tidak berbayar. Oleh itu, responden memperoleh perintah jualan menurut s. 256 Kanun Tanah Negara ('KTN'), perkara dalam rayuan pertama di sini. Dua rayuan lagi adalah terhadap penolakan permohonan perayu untuk mengetepikan perintah jualan dan permohonan lanjutan masa untuk memfailkan afidavit jawapan. Walau bagaimanapun, sanksi Ketua Pengarah Insolvensi ('KPI') untuk meneruskan rayuan, kerana perayu tidak dilepaskan daripada kebankrapan, hanya diberi untuk rayuan pertama. Oleh itu, rayuan kedua dan ketiga ditarik balik dan kemudian dibatalkan. Isu utama dalam rayuan ini adalah sama ada hakim bicara terkhilaf dari segi undang-undang dan fakta apabila membenarkan perintah jualan menurut s. 256 KTN. Perayu menghujahkan bahawa sekitar masa dia dihukum seorang bankrap pada September 2013, dia berjumpa dengan pengurus cawangan responden untuk membincangkan penyelesaian pinjaman-pinjamannya yang tertunggak

terhadap hartanah tersebut dan memohon untuk menebus hartanah itu. Perayu dimaklumkan tentang jumlah keseluruhan yang tertunggak dan, bersandar atas kenyataan dan representasi pengurus itu, isteri perayu membayar keseluruhan jumlah tertunggak untuk pinjaman perumahan dan pinjaman tetap, sejumlah RM177,680.05 ('jumlah penebusan'). Perayu memaklumkan responden bahawa hartanah itu telah ditebus dan bahawa peguam caranya akan menguruskan pelepasan gadaian dan menyertakan notis penebusan, yang mengandungi alamat terkini perayu. Tiada jawapan daripada responden. Empat tahun kemudian, perayu mendapat tahu bahawa hartanah itu akan dijual dalam lelongan awam menurut satu perintah jualan mahkamah. Perayu mendapat tahu bahawa responden menghantar kesemua surat menyurat ke alamat pejabat lamanya, dan menyatakan bahawa tiada satu pun yang diterimanya. Perayu menghujahkan bahawa dia telah menunjukkan sebab bertentangan mengapa perintah jualan tidak sepatutnya diberi langsung, iaitu, dengan mengemukakan keterangan menunjukkan bahawa pinjaman-pinjaman tertunggak telah pun diselesaikan. Selanjutnya, bayaran jumlah tertunggak disahkan oleh responden sendiri apabila responden menulis kepada KPI meminta persetujuan untuk menyimpan jumlah yang dibayar, menganggap pinjaman-pinjaman berkaitan telah selesai dan hartanah tersebut telah ditebus. Hanya apabila jawapan KPI bahawa apa-apa jualan melalui perjanjian persendirian tidak akan dibenarkan dan permintaan responden untuk menyimpan wang yang dibayar ditolak, responden memulangkan wang-wang yang dibayar kepada KPI. Permintaan KPI untuk jumlah penebusan diberi kepada jabatannya dipatuhi oleh responden dan selepas itu, responden memulakan prosiding *ad rem* bawah s. 256 KTN. Hujahan perayu adalah bahawa, pada setiap masa material, responden mempunyai pengetahuan penuh bahawa jumah penebusan adalah kepunyaan isteri perayu dan walaupun dengan pengetahuan itu, responden memberikan jumlah penebusan kepada KPI. Dalam perbicaraan rayuan, responden memohon untuk memperkenalkan empat keterangan baru sebagai keterangan baru dan lanjut, melalui lampiran 15a.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Terdapat merit dalam pemohonan responden untuk memperkenalkan empat keterangan baru kerana keterangan adalah relevan dan membantu rayuan ini dan sebenarnya berbangkit selepas keputusan ini dirayu. Oleh itu, permohonan responden dalam lampiran 15a dibenarkan.

(2) Tindakan untuk mengetepikan gadaian atas satu atau lebih alasan kebolehsangkalan bawah s. 340 KTN adalah tindakan *in rem*. Bayaran jumlah penebusan pada masa material disahkan melalui afidavit responden sendiri dan surat-surat yang dihantar kepada KPI. Surat kepada KPI mendedahkan, bukan sahaja penerimaan bayaran oleh responden dan penyelesaian jumlah penebusan, malah menunjukkan kepuasan hati oleh responden iaitu, terdapat jangka masa panjang antara

penerimaan bayaran sebelum responden memulakan pertanyaan dengan pejabat KPI dan sebelum responden akhirnya menyerahkan bayaran jumlah penebusan kepada KPI. Surat tersebut selanjutnya mendedahkan keputusan responden dan niat untuk menyingkap gadaian atas hartanah tersebut, bahawa responden hanya memohon persetujuan KPI untuk tindakan-tindakan dan keputusan-keputusannya kerana perayu telah diperintahkan bankrap.

(3) Ketidaksolvenan perayu adalah atas petisyen responden sendiri dan responden bukan seorang individu persendirian tetapi satu institusi yang menjalankan perniagaan pinjaman wang dan memegang sebagai jaminan atau kolateral untuk pinjaman tersebut, hartanah seperti hartanah tersebut. Responden juga dinasihati oleh peguam pada setiap masa. Oleh itu, amat menghairankan apabila responden boleh merujuk pada berbagai tindakan sebagai tidak sedikit pun memprejudis hak-hak dan kepentingan perayu kerana pinjaman-pinjaman yang tertunggak masih belum diselesaikan.

(4) Responden bersandar pada alamat lama yang diketahui seperti yang tertera pada dokumen-dokumen pinjaman untuk menyerahkan dokumen-dokumen yang relevan kepada perayu. Walau bagaimanapun, keterangan jelas menunjukkan bahawa responden telah menerima notis penebusan, yang di dalamnya alamat terkini perayu jelas dinyatakan. Oleh itu, responden dianggap mengetahui alamat tersebut atau sekurang-kurangnya, mempunyai notis mengenainya. Setelah bersandar pada notis penebusan dan setelah menerima bayaran, yang terhadapnya responden memohon persetujuan KPI untuk menyimpannya dan menganggap sebagai pinjaman yang ditebus dan gadaian disingkap, hati nurani dan kaedah-kaedah ekuiti menghalang pemberian permohonan responden untuk perintah jualan hartanah tersebut. Terdapat alasan-alasan kuat dan meyakinkan untuk menjustifikasikan penahanan relief yang dipohon bawah s. 256 KTN.

(5) Keterangan menunjukkan bahawa jumlah penebusan telah dibayar sepenuhnya, responden mempunyai niat untuk menyingkap gadaian dan menyimpan jumlah penebusan untuk satu tempoh yang panjang sebelum berjumpa dengan KPI meminta persetujuan untuk tindakan-tindakannya. Setelah gagal memperoleh persetujuan KPI, responden tidak pernah memaklumkan perayu atau isteri perayu tentang keadaan tersebut; malah gagal menjawab surat-surat perayu. Oleh sebab responden masih berniat untuk menebus gadaian, wujud alasan-alasan kuat yang meyakinkan untuk mewajarkan dan menjustifikasi penolakan permohonan responden.

Case(s) referred to:
Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Murugappa Chettiar v. Letchumanan Chettiar [1938] 1 LNS 42 HC ***(foll)***
Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor And Another Case [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 HC ***(refd)***
Public Finance Bhd v. Narayanasamy [1971] 1 LNS 176 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(2), 115(2)
National Land Code, ss. 256(3), 340
Rules of Court 2012, O. 83
Rules of the Court of Appeal 1994, r. 7(3A)

For the appellant - Ong Keh Keong; M/s Ong Partnership
For the respondent - Chua Por Ron & Mohd Hisyam Hilmi Abd Rahman; M/s Chua & Partners

[Editor's note: For the High Court judgment, please see United Overseas Bank (Malaysia) Berhad lwn. Tan Swee Thiam [2017] 1 LNS 1868 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim JCA:

[1] All three appeals arose from the same proceedings at the High Court wherein the respondent obtained an order for a judicial sale of land belonging to the appellant. The appeals are:

(i) Civil Appeal No: B-02(A)-584-03/2017 – this appeal is against the decision of the High Court granting the respondent's application for an order for sale of the appellant's property dated 21 April 2016.

(ii) Civil Appeal No: B-02(IM)-1736-08/2017 – this appeal is against the dismissal of the appellant's application to set aside the order for sale.

(iii) Civil Appeal No: B-02(IM)-1737-08/2017 – this appeal is against the dismissal of the appellant's application for an extension of time to file an affidavit in reply in the proceedings to set aside the order for sale.

[2] The circumstances leading to these appeals are these.

[3] On 21 April 2016, the High Court granted the respondent's application made pursuant to s. 256 of the National Land Code for an order of sale of certain charged property. The appellant had obtained a housing loan of RM199,000 ("the housing loan") and a fixed loan of RM44,000, both loans

totaling RM243,000 from the respondent. As security, the appellant had granted a charge in favour of the respondent, his property held under title HS(D) 123251, PT 1450, Mukim Damansara, Daerah Petaling, Negeri Selangor ("the said property"). We were led to understand that the appellant and his family live on the said property.

[4] On 4 September 2013, the appellant was adjudged a bankrupt by the High Court at Shah Alam. The housing loan consequently went into default. That is not in dispute.

[5] The respondent's application for an order for sale was granted on 21 April 2016. The appellant did not attend the hearing of the respondent's application but an officer from the Insolvency Department was present. The officer did not object to the respondent's application. The first appeal is in respect of the order for sale.

[6] Separately, the appellant filed an application to set aside the order for sale. That application was dismissed on 24 July 2017, and this forms the basis for the second appeal.

[7] At the hearing of the appellant's application to set aside the order for sale, the appellant had filed an application for an extension of time to file an affidavit in reply. That application was also dismissed, on 24 July 2017. The third appeal is in respect of this decision.

[8] Given that the appellant is an undischarged bankrupt, the sanction of the Director General of Insolvency was required for the conduct of the appeals. At the first hearing of these appeals, that is, on 9 February 2018, sanction had only been granted in respect of the first appeal. On 5 October 2018, the appellant withdrew the second and third appeals. Consequently, these two appeals were struck out with no order as to costs. Deposits were refunded to the Director General of Insolvency.

[9] The central issue in respect of the first and now, only appeal before us, is whether the learned judge had erred in law and on the facts, in granting the order for sale pursuant to s. 256 of the National Land Code. The appellant's contention is that he has successfully shown cause to the contrary as to why the order for sale ought not to have been granted in the first place and that the learned judge had erred in not acceding to his submissions.

[10] According to the appellant, around the time he was adjudged a bankrupt in September 2013, he had approached and met with one Mr Stanley, a manager for the respondent's branch at Puchong to discuss the settlement of his outstanding loans on the said property. He sought to redeem the said property.

[11] The appellant was informed by this Mr Stanley that the outstanding sum was RM145,283.64 for the housing loan and a sum of RM32,396.41 for the fixed loan. Relying on Mr Stanley's statements and representations, the

appellant borrowed money from his wife, Ong Beng Koon towards settling his loans with the respondent. On 11 October 2013, the appellant's wife, fully paid off both outstanding sums, that is, the redemption sum of RM177,680.05 ("the redemption sum"). The bank-in slip of the payment was adduced in evidence.

[12] On 16 October 2013, the appellant, through his solicitors, Messrs Ong Partnership informed the respondent that the said property had been redeemed and that his solicitors would be attending to the discharge of the charge. A notice of redemption dated 14 October 2013 was enclosed in Messrs Ong Partnership's letter to the respondent. In that notice, the appellant gave his latest address which was the address of the said property. There was no response from the respondent.

[13] Four years later, on 27 February 2017, the appellant learnt from a letter sent by Shrudy Resources that was put in his letterbox that the said property would be sold at a public auction on 8 March 2017 pursuant to a court order for sale (see p. 27 of the record of appeal). According to the appellant, he quickly met with the respondent to seek clarification as regards the auction but the respondent was not forthcoming or co-operating. He then found out that the respondent had been sending all correspondence and letters to his old office address, and he claimed that he had never received any of them.

[14] On 1 March 2017, the appellant's solicitors wrote to the respondent to call off the auction pending clarification of the whole matter since the appellant had already paid the full settlement. There was no reply from the respondent. On 7 March 2017, the appellant appealed against the order for sale granted on 21 April 2016.

[15] It was the contention of the appellant that he had shown cause to the contrary as to why the order of sale should not have been granted in the first place. There was evidence to the effect that the outstanding loans had been settled at the material time. Gathering from the affidavits filed in response to this matter, the appellant contended that the payment of the outstanding sums is actually confirmed by the respondent in that the respondent had itself written on 28 August 2014 to the DGI for consent to keep the monies paid, treat the related loans settled and the said property redeemed.

[16] The DGI did not reply till 13 February 2015. And, it was only upon the DGI's reply to the effect that any sale *via* private treaties would not be permitted and that the respondent's request to retain the monies paid was rejected that the respondent then returned the monies paid, to the DGI. Even then, it was not until the respondent's solicitors had enquired with the DGI as to whether it should return the monies paid to the appellant's wife, Ong Beng Koon or to remit the monies to the DGI. On 13 July 2015, the DGI

requested the redemption sum to be forwarded to its department. This was attended to by the respondent on 4 September 2015. On 19 February 2016, the respondent then commenced the *ad rem* proceedings under s. 256 of the National Land Code.

[17] It was the contention of the appellant that at all material time, the respondent was fully aware that the redemption sum belongs to the appellant's wife and that despite such knowledge had forwarded the redemption sum to the DGI. Against this factual backdrop, the appellant contended that he had shown cause to the contrary under s. 256(3) and following the Supreme Court decision in *Low Lee Lian v. Ban Hin Lee Bank Berhad* [1997] 2 CLJ 36, the order of sale ought to have been set aside.

[18] In allowing the application for an order for a judicial sale, the learned judge neither alluded to nor dealt with any of the matters raised by the appellant. In fact, the learned judge said nothing about what was raised by the appellant in any of the ten paragraphs of the grounds of decision. Instead, the learned judge pointed out:

(i) the state of insolvency of the appellant;

(ii) that the appellant was in default of the loans following his being adjudged a bankrupt;

(iii) that Form 16D had been duly served on the appellant at his last known address and with the DGI under s. 8(2) of the Bankruptcy Act;

(iv) that the appellant had not complied with Form 16D;

(v) that on the day of the hearing on 21 April 2016, the DGI had attended proceedings and had confirmed that the appellant had attended before the DGI;

(vi) that the officer from the DGI's department had not objected to the respondent's application;

(vii) that the respondent's application was in order.

[19] Following the above findings, the learned judge granted the respondent's application and ordered that the said property be sold at a public auction on 22 August 2016. That date was subsequently rescheduled for 8 March 2017. Nothing was said nor any deliberations conducted as to the contentions of the appellant.

[20] At the hearing of this appeal, the respondent had filed by way of encl. 15a, an application to introduce as fresh and further evidence, the following:

(i) Letter dated 2 January 2018 from the Director General of Insolvency (Selangor) ("DGI's letter");

A (ii) Valuation report dated 11 May 2016 by KPH Property Consultants (KL) Sdn Bhd;

(iii) Affidavit filed by the respondent explaining the remittance of the sum of RM177,680.05 on 15 September 2015 which sum was paid on 11 October 2015;

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(iv) Decision of the High Court in BA-24FC-190-02/2016.

[21] It was the submission of learned counsel for the respondent that all the above four pieces of evidence arose consequent to the appeal in which case, the application ought to be allowed under r. 7(3A) of the Court of Appeal C Rules 1994; and further, that the test laid down in *Ladd v. Marshall* [1954] 3 All ER 745 and endorsed by the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56; [1970] 1 MLRA 219, has also been met. These pieces of fresh evidence are argued to have a high influence on the appeal and also in the earlier application for an order for sale if they D were put before the High Court at the material time.

[22] The DGI's letter of 2 January 2018 is intended to show that contrary to the appellant's contention that the appeal was to "save an old man's house from auction", in view of the appellant's total debt, that fate is unavoidable or inevitable. According to the contents of the letter, three bankruptcy orders E had been granted pursuant to separate applications made by three different creditors, namely UOB (M) Berhad, RHB Bank Berhad and CIMB Bank Berhad. Eleven creditors have since lodged their respective proofs of debt and the total debt outstanding from the appellant is RM3,391,844.49. It was said that there were other creditors awaiting to be paid from the surplus of F the proceeds of sale.

[23] As for the valuation report, it revealed that the market price of the said property was RM750,000. As the sum owed to the respondent is RM177,680.05, there will be surplus from the intended auction sale. That surplus will be forwarded to DGI for distribution to other creditors.

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[24] The third piece of evidence is an affidavit proposed by the respondent explaining why the sum of RM177,680.05 paid on 11 October 2013 was only remitted to the DGI on 15 September 2015.

[25] The fourth and final piece of evidence is the decision of the High Court H dismissing the application to set aside the order for sale. Since the facts and issues are the same, the evidence ought to be admitted.

[26] The application was opposed by the appellant, primarily on the basis that the conditions of r. 7A and *Ladd v. Marshall* (*supra*) have not been met and that there was abuse of the procedure in r. 7A.

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[27] In respect of the respondent's application to introduce the four pieces of new evidence, which upon hearing the parties, we decided would be dealt with together with the main appeal, we find merit in the application. These

pieces of evidence are of relevance and assistance in this appeal, and in fact are evidence that arose after the decision appealed against. The respondent's application in encl. 15a is therefore allowed.

[28] As for the main appeal, we also found merit in the appellant's appeal. Indeed, there was ample evidence to the contrary that the learned judge at the High Court failed to consider, as clearly evident from the reasoning presented in this appeal. In the *locus classicus* decision on s. 256 of the National Land Code of *Low Lee Lian*, the Supreme Court explained what the term "cause to the contrary" meant. It opined through the clear judgment of Gopal Sri Ram JCA (as he then was) that "cause to the contrary" within s. 256(3) may be established only in three categories of cases.

> First, it may be taken as settled that a chargor who is able to bring his case within the exceptions to the indefeasibility doctrine housed in section 340 of the Code establishes cause to the contrary ...
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> In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought is defeasible upon one or more of the grounds specified under subsections (2) and (4)(b) above will be held to have established cause to the contrary under s. 256(3). The decision of Smith J in *Subchent Kaur v. Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189 of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.
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> Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.
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> Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v. Letchumanan Chettiar* [1938] 1 LNS 43; [1939] MLJ 296, 298 where he said:
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> > I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a Chargor, who shows that there would be no need to sell his land

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> if the chargee has been paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a charger may 'shew cause' either in law or in equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

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[29] After further examination of the facts and reasonings in *Murugappa Chettiar v. Letchumanan Chettiar* [1938] 1 LNS 42 and the Privy Council decision in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457, the Supreme Court went on to conclude as follows:

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> It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar's* case, the chargor must be able to point to a statutory direction or some rule of common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s. 256(3) ...

E

[30] The Supreme Court reminded of the distinction between rights *ad rem* and rights *in personam*. The action to set aside a charge upon one or more grounds of defeasibility under s. 340 of the National Land Code is an action *in rem*. In the opinion of the Supreme Court:

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> For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action *in personam*. The consequences of succeeding in such an action will have the effect of getting the chargee to defeat his own title or of depriving him of some or all of his rights under the registered charge, including the right to obtain an order for sale. See, *Oh Hiam & Ors v. Than Kong* [1980] 2 MLJ 159.
>
> Of course, it is not incumbent upon the chargor to bring an action to enforce the obligation of conscience operating against the chargee. He may, by establishing such an obligation of conscience, rely upon it to thwart an application under s. 256 of the Code.

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[31] The Supreme Court then went on to illustrate by reference to the cases of *Public Finance Bhd v. Narayansamy* [1971] 1 LNS 176; [1971] 2 MLJ 32 and *Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor & Another Case* [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198; [1989] 1 MLJ 261, what would fall within the principle in *Murugappa Chettiar*'s case that would amount to strong and compelling reasons to justify the withholding of the relief under s. 256. To act in the absence of such conditions "would be to ignore the mandatory language of s. 256(3) read with s. 340 of the Code."

[32] On the facts and circumstances in this appeal, we are strongly compelled to intervene not because we feel "sorry for the borrower" or because we regard "the lender as arrogant, boorish or mannerly," but entirely because the principle in *Murugappa Chettiar*'s case applies in the factual context of the allegations raised. The allegations were not mere allegations but were of merit, confirmed by the respondent's own actions. The payment of the redemption sum at the material time is not at all imagined. It is confirmed by the respondent's own affidavits and letters sent at the material time to the DGI – see para. 10 of the respondent's affidavit in reply and pp. 48 to 50, 55 to 68 of the record of appeal.

[33] We find the contents of the correspondence highly relevant and instructive as to the intent and decisions of the respondent. In its solicitors' letter to the DGI, the respondent *inter alia* stated:

> 3. Menurut permintaan Penghutang Penghakiman, UOBM telah memaklumkan kepada Penghutang Penghakiman bahawa jumlah amaun penebusan Hartanah tersebut adalah RM177,680.05 ("Amaun Tertunggak") dan Penghutang Penghakiman telah pada 11 Oktober 2013 membayar Amaun Tertunggak tersebut melalui mesin deposit cek UOBM. Semasa pemprosesan pembayaran tersebut, UOBM menyedari bahawa Penghutang Penghakiman telahpun dihukum bankrap pada 4.9.2013.
>
> 4. Memandangkan pembayaran Amaun Tertunggak tersebut berlaku selepas Penghutang Penghakiman telah diisytiharkan bankrap, kami dengan sesungguhnya percaya bahawa sanksi atau persetujuan pihak Tuan berkenaan dengan pembayaran Amaun Tertunggak dan penebusan Hartanah tersebut adalah diperlukan.
>
> 5. Kami melampirkan bersama surat ini salinan-salinan dokumen-dokumen yang berkenaan dengan Hartanah tersebut, untuk rujukan and rekod pihak Tuan.
>
> 6. Sekiranya pihak Tuan bersetuju dan tidak mempunyai sebarang bantahan berkenaan dengan pembayaran Amaun Tertunggak dan penebusan Hartanah tersebut, UOBM akan melepaskan gadaian yang didaftarkan bagi manfat UOBM atas Hartanah tersebut dan kami akan memajukan dokumen-dokumen asal yang berkaitan dengan Hartanah tersebut kepada pihak Tuan, untuk tindakan lanjutan pihak Tuan.
>
> 7. Semoga pihak Tuan dapat memberi maklum balas dengan kadar yang segera.

[34] The above letter reveals not only the respondent's acceptance of payment and settlement of the redemption sum, but shows complacency on the part of the respondent in that there was a prolonged lapse of time between the acceptance of payment before the respondent started its line of inquiry with the office of the DGI and before the respondent finally forwarded the payment of the redemption sum to the DGI. The letter further reveals the respondent's decision and intention to lift the charge on the said property, that it was merely seeking the DGI's sanction for its actions and decisions because the appellant had been adjudged a bankrupt.

[35] DGI did not reply immediately. Its office replied the respondent's letter of 28 August 2014 letter on 13 February 2015. Aside from telling the respondent that its office does not handle sales by way of private treaties, it reminded the respondent of its rights as chargee under s. 8(2) of the Bankruptcy Act 1967 and the National Land Code; that it will not object to the enforcement of such rights, that the respondent was not to receive any direct payment from the appellant in settlement of his loans with the respondent as such action would contravene s. 115(2) of the Bankruptcy Act 1967.

[36] Bearing in mind that the insolvent state of the appellant was upon the respondent's own petition – see bankruptcy search result at p. 18 of the record of appeal, that the respondent is not a private individual but an institution whose business is to lend money and hold as securities or collateral for such loans landed properties such as the said property, that it was advised by legal counsel at all times, we are surprised, to put it mildly, that the respondent can refer to these various actions as not being in the least prejudicial to the rights and interests of the appellant as the outstanding loans had still not been settled – see para. 12 of affidavit in reply at p. 50 of the record of appeal.

[37] Yet another troubling issue is the matter of service of the relevant documents on the appellant. The respondent had relied on the last known address as indicated in the loan documents. The evidence however, plainly show that the respondent was in receipt of the notice of redemption wherein the appellant's latest address was clearly imprinted. It must therefore be taken to have been aware of this address or at least, put on notice in that regard.

[38] In our view, having relied on the notice of redemption and having accepted payment for which the respondent was thus seeking the agreement of the DGI to keep the payment and treat the loan as redeemed and the charge lifted, we find that good conscience and the rules of equity militate against the granting of the respondent's application for an order for sale of the said property. These are strong and compelling reasons to justify the withholding of the relief sought under s. 256 of the Code.

[39] While the procedure under s. 256 is meant to be speedy and summary in nature, the learned judge hearing such applications for an order for a judicial sale, must nevertheless be concerned as to whether the appellant has been properly served; that the procedural requirements of O. 83 of the Rules of Court 2012 have been complied with; and that within the "very narrow question whether the material produced before him by the chargor constitutes cause to the contrary". The learned judge is required to carry out a careful and objective assessment of the factual material placed before the court. The judge is however, not required to express any view on the merits of any or all of the points taken by the appellant, "save to say whether, having regard to the three narrow categories ... laid down ... and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction." The judge "does not make, and in any event ought not to make, any adjudication upon any substantive issue" – see Supreme Court in *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119.

[40] Although the learned judge in the present appeal address the matter of service and compliance with the requirements of O. 83 and the National Land Code, which consideration we find to have been erroneous given the factual matrix, more significantly, the learned judge had failed to carry out the requisite assessment of the factual material placed before the court so as to decide the very narrow question of whether such material produced by the appellant constitutes cause to the contrary. Had the learned judge undertaken that exercise, and had done so carefully and objectively, the learned judge would have found, as we have, that the appellant had in fact satisfactorily shown cause to the contrary as to why the relief under s. 256 of the Code ought to be withheld from the respondent; that the appellant's complaints fall within the principle in *Murugappa Chettiar*'s case.

[41] The evidence produced showed that the redemption sum had been fully paid up, that the respondent had every intention of lifting the charge, and that it kept the redemption sum for a substantial period before approaching the DGI to sanction its actions. After it had failed in procuring the DGI's sanction, the respondent never advised the appellant or the appellant's wife about the state of affairs; it even failed to respond to the appellant's letters. The circumstances presented in the instant appeal are not dissimilar to those that arose in *Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa* (*supra*). There, the bank with prior knowledge (acquired through common solicitors), that the chargor had entered into agreements with sub-purchasers for the sale of a portion of the land to them, accepted the creation of a registered charge in its favour as security for a loan made to the chargor. When the chargor defaulted, the bank applied for an order for sale under s. 256 of the Code. The sub-purchasers intervened and opposed the application.

[42] Although fraud was not found, the learned Chief Justice nevertheless refused the bank's application for the following reasons:

> Under the circumstances, I hold that the plaintiff knew through their solicitors that the interveners were purchasers of a portion of the land. The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the two defendants. There is nothing to prevent the plaintiff from proceeding against the defendants or any party who was negligent in handling the charge transactions.
>
> Now that the first intervener had completed the purchase and had gone into possession, it would not be justified and would be plainly unconscionable to deprive him of the shophouse he had bought by holding that the charge was valid when in fact it was void, and consequently I refused to grant the plaintiff's application to have the land sold by public auction.

[43] Similarly, the principle in *Murugappa Chettiar*'s case applies in this appeal.

[44] Learned counsel for the respondent had further submitted that the monies paid by the appellant's wife be held under a *Quistclose* trust. We do not find it necessary to address this issue as this is entirely for the appellant's wife to take up as an action *in personam*. It would be outside the ambit of the present appeal to consider that issue on the merits or make the orders suggested.

[45] Suffice to say that learned Senior Federal Counsel from the office of the DGI had advised us that by its letter dated 18 January 2018, the DGI had informed the respondent that it was agreeable to the respondent's proposal to redeem the charge on the two terms expressed therein (there was a third term which has since been withdrawn). Those terms being that the DGI will pay the sum of RM167,296.75 in settlement of the outstanding loans with the respondent; and that the respondent will deliver the title to the said property free from the registered charge for the action of the DGI. This letter containing the aforesaid terms was tendered as exh. "A" in these proceedings. Seeing that the respondent was still intent in redeeming the charge, we find strong compelling reasons to warrant and justify the refusal of the respondent's application.

[46] For all the foregoing reasons, and on the terms set out in exh. A, we unanimously allow the appeal with no order as to costs. The decision of the High Court is set aside.